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No. 74-883

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

FEDERAL POWER COMMISSION,
Petitioner

v.

JOHN E. MOSS, ET AL.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENTS

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BRIEF FOR RESPONDENTS

OPINIONS BELOW

Before the Court in this review proceeding is a holding by the court of appeals that the Federal Power Commission lacks power to "pregrant" abandonment of service, *Moss* v. *F.P.C.*, 502 F.2d 461 (D.C. Cir. 1974). The opinion below thus set aside in part a statement of policy issued by the Commission in August 1972, *Optional Procedure for Certificating New Producer Sales of Natural Gas*, FPC Order No. 455, 48 F.P.C. 218, *rehearing denied*, 48 F.P.C. 477 (1972), adding Section 2.75 to Title 18 of the Code of Federal Regulations.

STATUTES INVOLVED

Abandonment of interstate natural gas service is governed by Section 7(b) of the Natural Gas Act of 1938, 52 Stat. 824, 15 U.S.C. § 717f(b), which provides:

> "(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment."

Initiation of interstate natural gas service is governed by Section 7(c)-(e) of the Natural Gas Act, as amended in 1942, 56 Stat. 83-84, 15 U.S.C. § 717f(c)-(e), which provides in pertinent part:

> "(c) No natural-gas company . . . shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, . . . unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations . . . .
>
> "(d) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require.
>
> "(e) . . . a certificate shall be issued to any qualified applicant therefor . . . if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements,

> rules, and regulations of the Commission thereunder, and that the proposed service [or] sale . . . is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. . . ."

QUESTIONS PRESENTED

1. Whether the Federal Power Commission may authorize a natural gas company to abandon service prior to the time the service is even commenced.

2. Whether the Federal Power Commission may authorize an abandonment solely by reference to standards appropriate to initial certification of service and without regard to the public's need for continuation of service as of the time abandonment will be effected.

STATEMENT OF THE CASE

The Commission's Order

In April 1972, the Federal Power Commission gave notice that it was considering the promulgation of an "optional procedure" for regulation of ~~procedures~~ producers (CA App. 1-11 [1]). Premised on the Commission's view that regulation under the Natural Gas Act has the effect of discouraging producer sales in interstate commerce, the proposed "optional procedure" was designed to diminish substantially the impact of regulation on producers electing the new procedure: such producers would be free to charge rates in excess of the applicable area ceilings; they would be free during the term of their contract to increase their rates without a contemporaneous investiga-

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[1] Because petitioner Federal Power Commission has declined to print an Appendix—its motion under Rule 36(8) to dispense with an appendix is presently pending before the Court—references are to the Appendix (and Supplemental Appendix) filed in the court of appeals, a copy of which is before the Court pursuant to Rule 25(1).

tion into the propriety of the increase; and they would be free to abandon service at the end of the contract term.

Because the Commission's proposed "optional procedure" appeared, in each of its major substantive features, to amount to partial deregulation without Congressional sanction, with substantially increased costs for the consumer, the Commission's April 1972 notice elicited an unprecedented number of adverse comments from members of the United States Senate and House of Representatives (see, e.g., CA App. 26-35; CA Supp. App. 24-47, 60-62, 79-91) and from other consumer representatives (see, e.g., CA App. 36-52, CA Supp. App. 1-7). Despite such opposition, however, and without holding any hearings, the Commission, in August 1972, adopted the new "optional procedure" substantially in the form originally proposed, FPC Order No. 455, 48 F.P.C. 218 (CA App. 57-92). Respondents' requests for rehearing (CA App. 93-110, 111-17) were denied on September 8, 1972, FPC Order No. 455-A, 48 F.P.C. 477 (CA App. 124-35), and timely petitions for review were filed with the United States Court of Appeals for the District of Columbia Circuit by respondents John E. Moss *et al.*, a group of twenty-one congressmen,[2] and by respondents American Public Gas Association, American Public Power Association, and Consumer Federation of America.[3]

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[2] The individual respondents are John E. Moss, John D. Dingell, Ogden R. Reid, Bella S. Abzug, Herman Badillo, Jonathan B. Bingham, Phillip Burton, Silvio O. Conte, Charles C. Diggs, Jr., George E. Danielson, Thaddeus J. Dulski, William D. Ford, Seymour Halpern, Robert L. Leggett, Bertram L. Podell, Benjamin S. Rosenthal, Robert O. Tiernan, Lionel Van Deerlin, Charles A. Vanik, Jerome R. Waldie, and Sidney R. Yates. At the time of initiation of review proceedings, each was a duly elected member of the United States House of Representatives.

[3] American Public Gas Association is the national association of municipal gas distribution systems, with over 200 member systems; American Public Power Association is the national association of municipal electric distribution systems, with over 1400 member systems; and Consumer Federation of American is a federation of over 200 local, state, and national organizations representing about 35 million consumer members. The City of Chicago intervened in the court below in support of APGA, *et al.*

The Decision of the Court of Appeals

Although the court of appeals heard argument on the legality of the Commission's "optional procedure" in September 1973, it withheld action pending issuance of this Court's June 1974 opinions in *F.P.C.* v. *Texaco Inc.*, 417 U.S. 380, and *Mobil Oil Corp.* v. *F.P.C.*, 417 U.S. 283. With those two decisions in hand, the court of appeals, on August 15, 1974, issued the opinion here under review, *Moss* v. *F.P.C.*, 502 F.2d 461. Written by Judge Robb for a unanimous panel (Judges Tamm, MacKinnon, and Robb), the opinion, while sustaining the Commission's action in major part, reflected the court's considerable difficulty with the Commission's optional procedure.

On the principal issue—the standard to be used to fix prices under the optional procedure—the court noted that "the Rule itself is ambiguous" and was "open to the construction that contract rates will be certified automatically as just and reasonable" (502 F.2d at 466), a construction that under this Court's decision in *Federal Power Commission* v. *Texaco, Inc.*, 417 U.S. 380, would render the rule invalid. The court concluded, however, that it should sustain the rule on the Commission's representation that in reviewing rates under the optional procedure the established standards of Section 4 of the Act—requiring consideration of the seller's costs—would be respected. The court held (502 F.2d at 467):

> "If in weighing the evidence the Commission violates those substantive standards, the aggrieved party will have a remedy in the courts. On the present record, however, we must assume that the Commission will

abide by the standards of the statute and the promises it has made. We cannot condemn the Commission on the theory that it may not do what it has promised to do."

With respect to the Commission's authority to approve rate increases in advance, the court of appeals noted that "any increases initially approved remain subject to review in future proceedings under Section 4(e)" —i.e., a future Commission could determine to suspend the increase and require justification for such increase at the time of its proposed effective date (502 F.2d at 468). And, while declining to prohibit the Commission's endeavor to make an advance determination of the reasonableness of future increases, the court indicated that it was "skeptical about the ability of the Commission to succeed in this endeavor" (*ibid.*).

Despite the court's predisposition to interpret the provisions of the Commission's rule in a manner that would render them lawful under the Natural Gas Act, the court could find no basis whatever for the "pregranted abandonment" provision of Section 2.75(e) of the Commission's Rules. Section 7(b) of the Act prohibits a natural gas company from abandoning service without permission from the Commission, "after due hearing, and a finding by the Commission that the available supply of gas is depleted to the extent that the continuation of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment." Under § 2.75(e) the Commission would "pregrant" abandonment authority at the time of initial Section 7(c) certification —some five or ten or twenty years in advance of actual abandonment, and without regard to the continuing need of the public for service. The court noted that "pregranted abandonment requires more clairvoyance than even the Commission's expertise reasonably encompasses" (502 F. 2d at 472), and accordingly held that such procedure

was neither contemplated nor authorized by Section 7 (b).[4]

The Commission petitioned for rehearing and for rehearing *en banc* but, on September 19, 1974, the petitions were denied without a dissenting vote. On June 16, 1975, this Court granted the Commission's petition for certiorari while simultaneously denying (two Justices dissenting) respondent Moss' conditional cross-petition in No. 74-1045.

Use of the Optional Procedure Since Promulgation of the Rule

At the time the Commission promulgated its "optional procedure" in mid-1972, the just-and-reasonable rate ceiling for new sales for most of the major producing areas was in the 24-26¢ per Mcf range, having reached that level as the result of the Commission's acceptance, in 1971, of a 26¢ settlement ceiling in the second Southern Louisiana area rate proceeding.[5] Although the 26¢ ceiling had been fixed some 30-40% higher than the 18.5¢-20¢ levels fixed just two years earlier (and affirmed on appeal) in the first Southern Louisiana proceeding[6] in

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[4] In addition to its rulings on the pricing standard, approval of future rate increases, and pregranted abandonment, the court also sustained a provision of the new rule that permitted an applicant to commence service immediately upon the filing of its application and, if the application had not been disposed of within six months, to charge the contract price free from refund obligation even if the subsequent decision on the merits should conclude that the contract price exceeded the maximum allowable under the optional procedure (502 F.2d at 468-69).

[5] FPC Opinion No. 598, 46 F.P.C. 86 (1971). The 26¢ ceiling fixed in Southern Louisiana II was ultimately affirmed by this Court in June 1974, *Mobil Oil Corp.* v. *F.P.C.*, 417 U.S. 283.

[6] FPC Opinion No. 546, 40 F.P.C. 530 (1968), as modified 41 F.P.C. 301 (1969), *aff'd sub nom. Austral Oil Co.* v. *F.P.C.*, 428 F.2d 407 (5th Cir. 1970), *cert. denied*, 400 U.S. 950 (1970).

reliance on the producers' representation that the 26¢ price would stimulate production and dedication of new reserves to the interstate market,[7] the Commission, in its optional procedure rulemaking, concluded that prices *higher* than the recently elevated just and reasonable ceilings were necessary to induce producers to undertake new interstate sales.

Immediately following promulgation of the optional ~~regulation~~ procedure, a number of applications pursuant thereto were filed; most of these called for initial prices in the 35¢-45¢ range and received Commission approval, see, for example, *Belco Petroleum Corp.*, Op. 659, 49 F.P.C. 1154 (1973), *rev'd sub nom., Consumers Union* v. *F.P.C.*, 510 F.2d 656 (D.C. Cir. 1974).

In June 1974, however, the Commission, in a rulemaking proceeding, raised *all* area ceilings to a new nationwide level of 42¢ per Mcf (on rehearing, six months later, the Commission increased this to 50¢ per Mcf)[8]; simultaneously, the Commission announced that it would undertake further upward revision of this escalated ceiling.

While the 45¢ prices approved in 1973 and early 1974 under the optional procedure may have influenced the Commission's conclusion to fix the new "just and reasonable" ceiling in the 42¢-50¢ range, once the Commission had done so, further applications under the optional procedure declined substantially.[9]

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[7] *See* 46 F.P.C. at 127, 164; 417 U.S. at 330-31.

[8] FPC Opinion No. 699 (June 21, 1974), as modified by Opinion No. 699-H (Dec. 4, 1974), *appeals pending sub nom. Shell Oil Co. et al.* v. *F.P.C.*, 5th Cir. Nos. 74-3330 *et al.* To the 50¢ price allowed by Opinion 699-H must be added approximately 7-8¢ in "adjustments" to make the figure comparable to the prior 26¢ ceiling.

[9] The quantum jump in the just and reasonable ceiling from 26¢ to approximately 55¢ with the promise of additional quantum jumps in the near future has, obviously, made the optional procedure less attractive.

This result is shown graphically in a recent report published by the Commission itself, F.P.C. Office of Economics, *Gas Supply Indicators*, First Quarter 1975 (annexed to FPC Release No. 21625, August 8, 1975). That report demonstrates (Charts IX and XI, pp. 26, 28) that after the just and reasonable ceiling was increased from approximately 25¢ to 50¢ in June 1974, sales under the optional procedure, never very substantial in volume notwithstanding their substantial price, declined drastically, accounting for only 1% of total new long-term sales during the first quarter of 1975. The Commission's data further show that new long-term sales *declined* by 40% subsequent to promulgation of the optional procedure in August 1972.[10]

ARGUMENT

The Commission's optional procedure here under review, like its small-producer exemption set aside by this Court in *Federal Power Commission* v. *Texaco Inc.*, 417 U.S. 380 (1974), reflects the Commission's view that regulation of producers under the Natural Gas Act is counterproductive, serving only to discourage new dedications to the interstate market, and that, accordingly, regulation should be made as much like non-regulation as possible.

It is therefore important, at the very outset of this argument, to note that the Commission's policy preference is neither lawful nor efficacious, and is assuredly entitled to no presumption of validity. It is not lawful for the very reasons expounded by Mr. Justice White for a unanimous Court just last year in *Texaco*, *supra*, at 400:

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[10] Chart XI reveals that new long-term sales in the six quarters preceding August 1972 averaged 158 million Mcf per quarter, but in the 10 quarters subsequent to August 1972 averaged only 96 million Mcf per quarter.

> "It may be, as some economists have persuasively argued, that the assumptions of the 1930's about the competitive structure of the natural gas industry, if true then, are no longer true today. It may also be that control of prices in this industry, in a time of shortage, if such there be, is counterproductive to the interests of the consumer in increasing the production of natural gas. It is not the Court's role, however, to overturn congressional assumptions embedded into the framework of regulation established by the Act. This is a proper task for the Legislature where the public interest may be considered from the multifaceted points of view of the representational process."

It was, of course, with the echo of *Texaco* still in the air that the court below set aside the Commission's pregranted-abandonment theory.

Even aside from its illegality, however, the Commission's inducement-of-supply-by-administrative-deregulation has been tried long enough to be adjudged a failure. Although during the first fifteen years of regulation of producers (1954-69) sales by producers to the interstate market increased from 5.1 trillion cubic feet to 13.2 trillion feet despite the fact that during most of this period prices were held stable at around 17¢ per Mcf, once the Commission, in 1969, adopted new "incentive" policies to avoid impending shortages, the prices escalated, while the anticipated shortage ripened into reality. Thus, interstate sales grew at a far slower rate in 1970 and 1971 than during the previous fifteen years, stopped growing altogether in 1972, and have declined steadily over the past two years. Yet, while this decline in supply was taking place, the average wellhead price, under the Commission's various "incentive" policies, has increased from 17.5¢ per Mcf in mid-1969 to 23¢ in September

1973 (immediately prior to the Arab oil embargo) to approximately 35¢ today.[11]

I. The Federal Power Commission Lacks Statutory Authority To "Pregrant" Abandonment of Service at a Time When It Cannot Evaluate the Public's Need for Continuation of the Service Being Abandoned.

A. *In Determining Whether Abandonment Can Be Authorized Under Section 7(b), the Primary Consideration Is the Public's Need for Continuance of the Service To Be Abandoned.*

The abandonment provision of the Natural Gas Act—Section 7(b)—was part of the original Act, and has continued unchanged throughout the Act's 37-year history. The Section prohibits abandonment of service without prior FPC approval; it requires a hearing before approval can be granted; and it specifies two, and only two, grounds for Commission approval: (1) "that the available supply of natural gas is depleted to the extent that the continuation of service is unwarranted," and (2) "that the present or future public convenience or necessity permit such abandonment."

The Commission, making no claim that "pregranted abandonment" can be predicated on the first ground, rests its entire case for pregranted abandonment on the second ground. Both the statutory language and the cases decided under it defeat the Commission's claim.

The leading case on the criteria for abandonment under Section 7(b) is *Michigan Consolidated Gas Co.* v. *F.P.C.*, 108 U.S. App. D.C. 409, 283 F.2d 204, *cert. denied sub nom., Panhandle Eastern Pipe Line Co.* v. *Michigan Consolidated Gas Co.*, 364 U.S. 913 (1960), a case mentioned, but not discussed, by the Commission (see

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[11] 34.71¢ per Mcf as of May 1975, the latest period for which figures are available, FPC Release No. 21674 (Aug. 25, 1975).

FPC Br. 18). In that case, the court set aside an FPC order authorizing Panhandle Eastern Pipe Line Company to abandon service to the Detroit area. Speaking for a unanimous panel that included Chief Justice (then Judge) Burger, Judge Bazelon examined the purport of the statutory language in Section 7(b) (283 F.2d at 214):

> "The fact that abandonment of public service requires Government approval symbolizes the special legal status and obligations of common carriers and public utilities. This includes an obligation, deeply embedded in the law, to continue service. When Panhandle sought and obtained a certificate of public convenience and necessity to serve the Detroit market, it became the exclusive supplier for that market. If it wants to abandon service because it must now share that market, or because it prefers to use that gas for more profitable unregulated sales, or because it wants to be rid of what it considers a vexatious servitude, these are not reasons for granting its request. Abandonment may be allowed only if 'the public convenience or necessity permit.' And the word 'permit,' instead of 'require,' does not shift the burden to those opposing the application. An applicant for abandonment under § 7(b) of the Act has the burden of making the factual showing which will assure the Commission, charged with protecting the public interest, that that interest will in no way be disserved; just as the applicant under § 7(c) for a certificate to commence service must bear the burden of proving that that public interest will be served."

The next major discussion of Section 7(b) was in this Court's decision in *Sunray Oil Co.* v. *F.P.C.*, 364 U.S. 137 (1960), a case that directly involved initial certification under Section 7(c) rather than an abandonment application under Section 7(b). In sustaining the Commission's power to grant a certificate of unlimited duration rather than a certificate limited, as requested by the applicant, to the 20-year term of the underlying contract, the Court laid heavy emphasis on the intent of Section 7(b). Thus, the Court noted that if a limited-term certificate were granted,

> "at the end of the period, petitioner would become free to cease supplying gas to the interstate market . . . without further leave of the Commission, and without there having been made the findings that Congress deemed necessary.
>
> "If petitioner's contentions . . . were to be sustained, the way would be clear for every independent producer of natural gas to . . . automatically be free at a future date, untrammeled by Commission regulation, to reassess whether it desired to continue serving the interstate market.
>
> ". . . If an individual producer were thus left free to discontinue his supply, the transmission company would be forced to find a supplier of gas elsewhere, and make connection with him, to continue its service; and the consumer ultimately would pay the bill for the rearrangement." (364 U.S. at 142-43, ~~emphasis supplied~~.)

This Court explicitly noted its concern with an interpretation of the Act that might result in permitting "an advance license for the abandonment of the continued supply of gas," 364 U.S. at 147, and it spoke disapprovingly of arrangements that would give sellers "power to abandon service, at a contract's termination, without *contemporaneous* Commission approval" (*ibid.*, emphasis supplied).

Six years after *Sunray*, the Court again addressed itself to the statutory purpose intended by Section 7(b). Speaking for a unanimous Court in *United Gas Pipe Line Co.* v. *F.P.C.*, 385 U.S. 83 at 88 (1966) (emphasis supplied), Mr. Justice White specifically relied on the

Commission's "regulatory responsibility to assure that gas once dedicated to the interstate market will continue to be available to that market *so long as the public interest demands*" as sufficient basis for requiring the pipeline *purchaser* to continue taking deliveries from a producer after expiration of the contract term.

Finally, in *Transcontinental Gas Pipe Line Corp.* v. *F.P.C.*, 488 F.2d 1325 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974), the Court reaffirmed that, in determining whether abandonment should be permitted under Section 7(b), the Commission must give primary weight to the public's need for continuation of the service proposed to be abandoned, and held that the Commission had "erred in according dispositive weight to private, albeit Commission approved, contractual arrangements," 488 F.2d at 1328-29.

B. *The Commission's "Pregranted Abandonment" Proposal Fails To Meet the Statutory Requirements.*

As the cases discussed *supra* make clear, abandonment of service (except for depletion of supply) is to be permitted only on a finding by the Commission made contemporaneously with the proposed abandonment that the public no longer has a need for continuation of the service to be abandoned. What the Commission proposed in its rule set aside by the court of appeals was not merely a drastic shift in the *timing* of the grant of abandonment—from contemporaneous with abandonment to contemporaneous with initiation of service—but, in consequence, a drastic shift in the *standard* to be employed for determining whether to permit abandonment. Instead of focusing upon the public's need for continuance of service at the time of proposed abandonment [12]—a

[12] The Commission's suggestion (Br. 16) that, by the time of discontinuance, the gas shortage "might be less critical" is not merely a *post hoc* rationalization of counsel unsupported by anything in the record but is precisely the type of ouija-board clairvoyance rightly condemned by the court below. The suggestion is, moreover, not merely *post hoc*, but *ad hoc* as well: heretofore, the Commission has consistently asserted that the gas supply situation will deteriorate over time.

consideration that cannot be meaningfully weighed ten or twenty years in advance and which the statute wisely does not require be made years in advance [13]—the Commission intends to pregrant abandonment at the time of proposed initial certification of service on the grounds (1) that the public needs the gas and (2) that the producer "may be unwilling to make an indefinite commitment to the interstate market" (FPC Br. 16-17).

Since, however, proof of the public's need for *initiation* of service is a prerequisite for certification under Section 7(c), *Federal Power Commission* v. *Sunray DX Oil Co.*, 391 U.S. 9 at 51-52 (1968), acceptance of the Commission's position would result in the elimination of Section 7(b) as a separate and additional protection to the public.

Both the language and the structure of the Act indicate that the Commission has erred both with respect to timing and with respect to the governing standard.

To begin with, it should be noted that the abandonment provision (Section 7(b)) was part of the original

[13] The Commission's contention (FPC Br. 13-15) that, because in some instances agency decisions must (and hence lawfully may) be based on estimates as to the future, an agency may rely on its estimates of the distant future even when there is no compelling reason not to defer the determination to a date nearer the event in question, is at best a *non sequitur*, at worst disingenuous. It is a *non sequitur* because the reason for permitting reliance on forecasts of the future—the necessity for doing so, and the inability to delay decision—is not present here. It is disingenuous because in pregranting abandonment the Commission does not intend to undertake (assuming it meaningfully could) the advance determination of the public's need for continuation of the service to be abandoned; rather the standard will be, as the Commission concedes (Br. 16-17), whether the seller would refuse to sell gas needed now unless abandonment authority is pregranted.

Natural Gas Act of 1938, 52 Stat. 821; the certificate sections (7(c), (d), and (e)) did not come into the Act until 1942, 56 Stat. 83. Thus, from 1938 to 1942, service could be commenced without Commission approval, but once commenced could not be abandoned. And, from the beginning, Section 7(b) authorized a "natural-gas company"—i.e., one who, under Section 2 (6), is presently "engaged in . . . the sale . . . of gas"—to seek permission to terminate the sale; in this respect, the different language in Section 7(c)—a "natural-gas company *or person which will be a natural-gas company*"—is instructive.

Further, all of the operative language of Section 7(b) is in the present tense: under the first clause, the finding must be that the "supply of natural gas *is* depleted to the extent that continuance of service *is* unwarranted." Clearly, such a finding requires a hearing at the time of proposed abandonment, when depletion has already occurred. The language calling for obtaining Commission approval, "after due hearing and a finding by the Commission" applies to both statutory grounds, depletion of supply and public convenience and necessity, and there is no basis for concluding that the identical language can refer only to a contemporaneous hearing and finding with respect to depletion but can permit a years-in-advance hearing and finding with respect to public convenience and necessity. Moreover, the second ground, too, is phrased in the present tense—"permit", not "will permit". Significantly, in the portion of the rule set aside by the court below, the Commission did not talk about permitting or approving abandonment, which is what Section 7(b) is all about, but rather the Commission spoke of "pregranting" abandonment authorization—i.e., tying the hands of a future Commission by depriving it of the right to determine whether an existing service should be abandoned. "Pregrant" of authority is alien

to this statute, however, and the Commission fails to cite any precedent in its 37-year history for its novel interpretation of Section 7(b).

The structure of the Act, as well as its language, compels the conclusion that the Commission seeks to use the wrong standard for abandonment. The public's need for new service is the standard for granting initial service under Section 7(c). If that same standard, at the same initial certificate proceeding, can (by the expedient of the producer's statement that he will not sell his gas to the interstate market without pregranted abandonment) also become the standard for abandonment of service at the end of the contract term, then Section 7(b) has been effectively read out of the Act.

Under the logical statutory scheme of Section 7 of the Natural Gas Act, whether a certificate to commence a sale should be granted is determined under Sections 7 (c) and (e) by the facts and circumstances existing at the time the sale is to begin. Similarly, whether authorization to abandon a sale should be granted is determined under Section 7(b) by the facts and circumstances existing at the time the sale is to terminate. The concept of pregranted abandonment, therefore, is contrary to the language and spirit of Section 7 of the Act.

The legal basis for the Commission's thesis, that pregranted abandonment offers an added inducement to the producer to sell to the interstate market, has, as noted *supra* pp. ~~11-12~~ 9-10, been rejected by this Court's *Texaco* decision: if regulation under the Natural Gas Act has the effect of discouraging dedications to the interstate market, the remedy lies with Congress, not with administrative attempts at partial deregulation. There is, moreover, little if any factual basis for the Commission's thesis. There is no evidence in the present record to support the premise; and indeed the Commission points

to no evidence outside the record. And to the extent that added inducement is required to entice gas away from the intrastate market, it surely cannot apply to gas sold from offshore federal leases, which can only be sold in interstate commerce.[14] Yet the bulk of "optional procedure" cases have involved federal domain gas! Even *amicus* Interstate Natural Gas Association recognizes (Amicus Br. 3 n. 4) that the incentives of the optional procedure are not required for offshore gas.

To the extent that the unregulated intrastate market is siphoning off gas supplies needed by interstate users, the solution would appear to lie primarily with Congress, and not with a Commission attempt to have the regulated interstate market emulate the unregulated market. If the two markets are to be brought into conformity, however, without further legislation, it would appear that the appropriate procedure would be for the Federal Power Commission to protect the interstate market from undue discrimination by allocating supply between the interstate and intrastate markets on the basis of articulated and defensible national priorities under this Court's holdings in *Houston East & West Ry Co.* v. *U.S.*, 234 U.S. 342 (1914), and *Federal Power Commission* v. *Louisiana Power & Light Co.*, 406 U.S. 621 at 632-35 (1972), and under the authority of the Commerce Clause of Article I, Sec. 8 of the United States Constitution, the Supremacy Clause of Article VI, para. 2 of the United States Constitution and Section 4(b) of the Natural Gas Act, 15 U.S.C. § 717c(b).

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[14] The Commission has recently recognized as much. In Order No. 533 (adding new Section 2.79 to 18 C.F.R., Aug. 28, 1975), promulgating yet another rule to attract intrastate gas to the interstate market, the Commission stated, mimeo. p. 21:

> "Moreover, one of the main goals of our policy is to increase supplies available to the interstate market from the unregulated intrastate market. Since gas produced in the off-shore federal domain is already available to the interstate market, we feel it is unnecessary to include the off-shore federal domain within the scope of this policy to achieve our goal."

II. The Commission's Brief on the Merits Raises No Issue Warranting Supreme Court Review.

The brief on the merits filed by the Federal Power Commission, when coupled with information that has only recently become available, reveals far more clearly than did the Commission's petition for certiorari that the decision of the court of appeals, if left undisturbed, would have no adverse impact on any significant Commission policy or program.

The facts are now clear. Particularly since the doubling of just and reasonable ceilings by Opinion Nos. 699 and 699-H, the optional procedure—with or without pregranted abandonment—has been little used. There has been no showing that restoration of pregranted abandonment authority would result in the dedication of additional supplies to the interstate market. There is little evidence that the Commission itself knows what circumstances would warrant pregranted abandonment;[15] in any event, it apparently has not, at least during the three years that this appeal has been pending, actually attempted to pregrant abandonment authority under Section 2.75. And while the Commission's membership has been changing rapidly, at least one of the new Commissioners has serious reservations about the wisdom of any form of short-term sale, see, e.g., *Matter of Barton*, 51 F.P.C. 1169 at 1171 (1974). Finally, the Commission has failed to show any basis for the optional procedure, and *a fortiori* for pregranted abandonment, in the crucial federal offshore area.

Under these circumstances, respondents would respectfully suggest that the writ of certiorari in this proceeding be vacated as improvidently granted.

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[15] The one example cited by Commission counsel (FPC Br. 18 n. 10) could be the subject of a far narrower regulation than the overbroad one set aside by the court below.

CONCLUSION

The writ of certiorari heretofore granted should be vacated as improvidently granted. In the alternative, the judgment of the court of appeals insofar as it set aside the pregranted abandonment provision of the optional procedure should be affirmed.

Respectfully submitted,

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